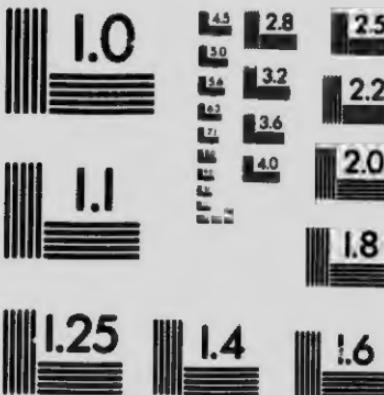


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ADDRESS BY
HONOURABLE WILLIAM H. TAFT

at the

Fifth Annual Meeting

of the

Canadian Bar Association

Ottawa, September 1st, 1920



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ADDRESS BY HONOURABLE WILLIAM H. TAFT

OTTAWA, SEPTEMBER 1st, 1920

Mr. Chairman, Your Excellency, Lord Cave and the Political Hierarchy of Canada, together with that association of gentlemen whom I now have the honour of addressing, upon whom and upon whose advice and strength and force of character they all rely—the members of the Canadian Bar Association:

I thank you for this welcome. It is a pleasure to come here, in spite of the fact that Sir James Aikins has imposed on me the duty of speaking—something in which I have had very little practice. (Laughter). I am honoured by the presence of the representative of the Crown here, the Duke of Devonshire, whose kind hospitality I am enjoying. It has been a great pleasure to meet my fellow guests, the Privy Councillor Lord Cave and the American Ambassador—or at least the British Ambassador to America.

When I come here I cannot help feeling as if I was in at the birth of this Canadian Bar Association. I remember well, as doubtless many of you do, that great meeting of the American Bar Association at Montreal, and the very beautiful address of Lord Haldane, who was the guest of the Association on that occasion. I remember his discourse on "Sittlichkeit and Gemuthlichkeit," in 1913, which did not immediately appear as the controlling influence in the world within the year following. (Laughter) But it was a beautiful address and it had a truth in it that must not be lost, and that was that the union of nations for the good of the world must depend upon their spirit of co-operation and their kindly feeling to one another, as the indispensable basis of any improvement in international matters and in the organization of any successful union of the forces of the world to preserve peace. I am glad to know that the Canadian Bar Association, which I hope I am not wrong in saying had the suggestion of its organization from that meeting, has attained the strength and usefulness which this meeting and the previous meetings have developed.

I am here, I am glad to say, as the representative of the American Bar Association (applause) to express to you our fraternal congratulation upon your successful organization and life. Mr. Hampton Carson, the President of that Association, asked me to come; and your President was good enough to press me to come, with an incidental reference to a "word or two" which he said he would be glad to have from me. Having had

some experience of that kind of invitation, however, I am not surprised to find that I was to be given a full afternoon (laughter) for a formal address. I can only be thankful that it was not called an oration. Ordinarily in our country that is what it is called.

What can a man do, thus invited, responding to an obligation to come, seeking a vacation, without a secretary, when he is asked to make an address? Well, I turn always when I am in doubt as to what the professional duty of a lawyer is, to the professional ethics of the profession of clergymen; and when they are away on a vacation and called upon to discharge their professional functions, they turn the barrel up and they proceed to visit upon their temporary auditors sermons which are good because they have used them so often. (Laughter). Therefore it is that in selecting the text for my remarks I am going to say something about what you may have heard before, and what I certainly have heard of before. A text here should be legal; it should be something having the professional cast; and something of common interest. Now, I am sure the League of Nations has common interest; whether there is common agreement or not, it has common interest for us all, and if I can limit my discussion to the legal aspects from the standpoint of one country, perhaps it is not inappropriate that I should extend my remarks along that line.

I was delighted with the ceremonies and the speeches this morning—His Excellency's address and that of your President, Sir James Aikins. I was delighted both because of the intrinsic merit of what was said, and also because misery loves company, to know that you too are not without your constitutional difficulties, that you too are constantly engaged, perhaps not so much as we, but nevertheless that you have questions as to your fundamental law and what it really means; and you have that advantage that we all have of making it mean, when you are construing it, what suits you. Now, we have in our country, I fancy, more discussion of constitutional questions than any other country in the world. When I say "constitutional questions" I do not mean the discussion of such a thing as the British Constitution, which is unwritten and which is certainly not the construction of an exact document. But we began with a written constitution; we began with differences that were avoided by an instrument to which the different sides gave different constructions, and ever since the foundation of our government our politics have been largely, not altogether, but in a greater measure than in any other country, a discussion of what our fundamental law means. The question of the division of power between the States and the Central Government, the question of slavery, which was mentioned in the constitution, and which ultimately

led to the Civil War, all tended to make every political issue savour of constitutional construction. It is to that side of the League of Nations, that I would like to invite your attention. I mean by that side the construction of the League of Nations from the standpoint of the federal constitution of the United States, and the question whether the League of Nations, as submitted to the Senate of the United States, is in violation of any of the provisions of the constitution of that country.

We of course inherit from you this character of question, because I presume the written constitution of the United States was suggested by our relations to the Mother Country. The powers to be exercised by a dependent government under a charter of that government, with a sovereign or with a court of a sovereign to pass on the question whether that charter has been violated or not, suggested what has followed in the United States. It was extended in this wise. The United States is an independent sovereign government with three branches, the legislative, executive and judicial branches, somewhat more rigidly separated than are those branches in your government. They are co-ordinate branches. Who, then, is to determine whether each branch keeps within its limitations? The court was forced into the position, in the litigation of private rights and in its obligation to declare the law, of having to pass on the validity of the action of the legislative and executive branches, even though they were co-ordinate branches. Of course that duty is limited by the possibility of raising the question in a litigated case where the court must act and declare the law accordingly.

So it is that we have had in our country lawyers who were constitutional lawyers—and I have thought, a good many who were unconstitutional lawyers. (Laughter). Therefore, even though this may seem solemn and narrowly professional, it would not seem so at home. When you wish to dignify a man at home among his clients, not so much among his fellows at the bar or with the court, you call him a "con-sti-tu-tional" lawyer. There is something about that name that so fills the mouth that it carries dignity with its very expression. (Laughter).

Now, you must be interested as lawyers and as leaders of political thought in Canada in what the powers of the United States are as a neighbour in making treaties. That is the question that I want to discuss today. You must be interested to know how far we can go, and how far you can go in entering into contracts with us and be sure that when the contracts come to be enforced we cannot plead that we were acting *ultra vires*.

The treaty-making power is entrusted, in our constitution, to the President and it is placed among his executive powers.

"The President shall make treaties by and with the advice and consent of the Senate" — by two thirds of those present. The Senate is the body, we say, that represents the States. It is a body whose membership cannot, by the terms of the constitution, ever be changed. Each state is entitled to two representatives; and that is the only provision in the constitution now that is not the subject of amendment. And this requires that those who are selected by the States—two-thirds of them—shall ratify any contract or treaty that we may make with other countries. Congress is not the treaty-making power; it is the law-making power.

Now you ask—and I refer to this because it seems to arouse some interest here when it is referred to—How did we make the Reciprocity Treaty—or propose to make it? (Laughter). Well, that arose in this wise. It was not a treaty. We had an informal agreement, but it was not a treaty that we made at all. Each government agreed, informally, to pass a law. The law of the United States was that tariff rates with Canada should be at a certain figure whenever Canada should pass a law of a similar character. Each could retreat from that at any station at all. There was no obligation to continue it; there was no promise to continue it. It was a case where the law on one side was made to be dependent on the operation of the law on the other. It was, if you choose to call it so, a meeting of minds, which could be withdrawn from at will, but it was not a promissory agreement in the sense of contracting to do something in the future.

It was proposed—indeed there was a resolution passed by the two Houses, by which Congress declared peace in the present contingency. Congress may declare peace, and if the country with whom peace is to be established declares it also, there is a meeting of the minds and peace is created — the status of war is changed by that declaration. Or it may operate in a different way. There may be actual peace. International lawyers recognize that peace can come without a treaty or a definite agreement, by the acquiescence *in pais* of both sides; and such a declaration of Congress would be an authoritative recognition, an additional evidence of the existence of that status that had come about *in pais* by the ceasing to fight and by acquiescence in a state of peace. But that is not promissory; that is only changing a status, and when the status is changed the thing is accomplished, a *fait accompli*, and therefore it is not in the nature of a contract for something in the future binding on Congress, because one Congress cannot bind another. I say that with reference to the difference between the treaty-making power which implies in itself the power to promise something in the future and to bind the country to it, and the action of Congress.

This treaty making power of the United States, I venture to say, is larger in certain respects than the treaty-making power of any other country. At least, if there is any other country in which the same character attaches to a treaty I do not know it. The constitution says that:

"this constitution, the laws passed in pursuance thereof, and treaties made under its authority, shall be the supreme law of the land";

and, construing that declaration, our court has decided that a treaty which is, in its form, of a statutory character, enacting something *in presenti*, but not in promissory form, is a law of the United States. As, for instance, we made a treaty, as we did, with China, that certain classes of Chinese might come into the States. That needed no law to give it effect; it was in itself a law enacted by the treaty-making power. And that has led to what seems to other countries to be peculiar—the fact that such a law may be repealed by subsequent statute, the later declaration of the legislative power controlling. Therefore when we could not arrange with China to change that treaty, Congress broke the treaty—that is what she did—broke the treaty and repealed the law of that treaty, the treaty remaining binding on the Government as an international matter, but the domestic effect of the treaty is ended and the provisions of the law substituted. And so, too, it has happened that a treaty can repeal a law, where the treaty is of the character which I have described.

More than this, the treaty-making power in the United States exceeds that of Congress in the subject matters that it may deal with and control. We deal only through the Federal Government with other nations. The Federal Government represents the nation. In treaties of amity and commerce we often have to deal with matters over which the States, under our polity, exercise exclusive control; as for instance the matter of the descent and distribution of the estates of deceased persons. Many of the States have provisions by which aliens are not allowed to take under certain conditions. The treaty-making power may by a treaty suspend the operation of a State law in reference to such distribution and confer by law on aliens of another country the benefit of such suspension and may put into a treaty a provision in their behalf. That was decided in the case of *Geoffrey v. Riggs* by the Supreme Court of the United States. There the statute of Maryland denied to a French alien the right of inheritance, the taking of land under that jurisdiction. A treaty provided that French aliens should have the right of distribution, and that suspended the State law as far as French aliens were concerned.

I instance these two things to show you that, however much the treaty-making power of the United States is discussed and minimized, these features indicate that it was no mean power

that was being conferred on the President and two-thirds of the Senate, when it was reposed in them and not given as well to the House of Representatives. Now, in this case the Supreme Court, speaking of the treaty-making power, used this language—if I may test your patience. The language of Mr. Justice Field was as follows:

The power is unlimited except by those restraints which are found in the constitution against the action of the Government or its departments, and those arising from the nature of the Government itself and that of the States. It would not be contended that it extends so far as to authorize what the constitution forbids, or a change in the character of the Government or in that of one of the States, or a cession of any portion of the territory of the latter (that is, of the State) without its consent. But with these exceptions it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."

I think you will see that that is pretty wide language.

Now, this treaty-making power has been the subject of contention from the beginning because Congress holds the purse strings and matters of that sort first come into the House of Representatives. When the Jay Treaty was made, which was not particularly popular in the United States, and Congress was called upon to appropriate money which the treaty bound us to pay, Congress passed a resolution asking President Washington to send the papers concerning the Jay Treaty to the House, in order that they might judge of the propriety of this treaty before they paid the money required by its terms; and President Washington sent back to them, in deferential words, which he always used, a very plain intimation that those papers were none of their business; that this was an obligation of the United States, plain in its terms, and that therefore it was their constitutional duty to perform the obligation of the United States by paying the money provided in the contract. And with a protest, and a resolution, and a kick, they paid the money. (Laughter.)

So Hamilton; so Jefferson; so Calhoun. In other words, the House has never refused to perform such a requirement in a treaty, although you can find resolutions in which the House has protested that it ought to have something to say about the debts to be created, which it is called "upon to pay."

Now, with this preliminary declaration, perhaps too long—but that is one of the defects of the con-sti-tu-tional lawyer that he is long (laughter)—I come to the question: what is this Covenant of the League of Nations? Because in considering its Constitutional validity under our fundamental law it con-

duces somewhat to clarity of thought to know what we are talking about. (Laughter).

As I read the Covenant it is not an instrument that establishes a government at all. It is a partnership agreement made up of two kinds of stipulations. The first kind of stipulation is of those agreements which are self-restraining covenants, covenants not to do things likely to lead to war, covenants not to exceed an agreed limit of armament, which each nation enters into, a covenant, under Article X, to respect the territorial integrity and the independence of every other member of the League. Under articles XV. and XVI. and earlier articles, are perhaps the most important covenants of this class, a covenant not to begin war on any difference with another nation, but either to submit that difference to arbitration or, as a matter of course, to turn it over to the Executive Council, or if not referred to the Assembly, and a further covenant not to begin war within three months after the award or the recommendation of settlement, as the case may be. Then there is a covenant not to make secret treaties, but to put a provision into treaties that they shall not be binding until they are spread out for public knowledge in the registry of the secretariat. Those are the restraining covenants. Then there are agreements which are directed towards the penalizing and the enforcement of those restraining covenants. That is to be done by the united action of all the other members of the League. There is no court provided in the Covenant to construe what that united obligation is, and there is no executive to enforce that affirmative obligation of the members of the League. That is, and must be, left under the terms of the Covenant to the conscience and good faith of the members of the League; not only compliance with the obligation, but the construction of what the obligation is. I repeat it, there is no court to construe these enforcing obligations authoritatively.

The only two bodies of the League are the Council, originally called the Executive Council but improperly so, and now changed to the Council in the final form of the League because the word "Executive" was improper—the Council and the Assembly; and their duties, with one or two unimportant exceptions that I have not time to attend to, are only advisory so far as executive matters are concerned—only recommendatory. They do sit as quasi-judicial bodies where arbitration is not resorted to; but to say that a body which sits as a court constitutes a government with executive power is, it seems to me, to pervert the ordinary meaning of terms.

Now you say that this does not amount to much as an organization, if there isn't anything but conscience and good faith back of those who are to see to it that the self-restraining covenants are enforced. Well, if that is so, then it is not a

strong document. And it only recurs to what I said with reference to Lord Haldane's address, that the strength of the League, its efficiency, must depend on the spirit of co-operation, the conscientious performance of obligation, in good faith construed, by those who have assumed it, to make the League effective, and it does not make any difference how strong you may make the provisions, unless you have *that*, every League in whatever form, will fail. (Applause).

Now, what are the constitutional objections on the part of those in the United States who oppose the League? I am not going into the merits. Of course, objections on the merits are objections of policy — the chief objections are objections of policy. The departure from the long-honoured separation of the United States from European and world politics and matters has made our people naturally cautious and anxious if possible to avoid the burden that must be assumed in taking over new obligations; and that I don't intend to discuss. The whole matter is apparently in this present presidential campaign; not so much the constitutional question, I think, because the other side, that on the merits, is more emphasized. Then, too, there are a number of people, including myself, who think that it is not really in the campaign at all, and that, while the discussion is very extended, the result of the election is not likely to be regarded, properly to be regarded, as a decision on that issue and that, therefore, much as it is talked about, it is not a real issue in the campaign. That will appear by future developments in the campaign, when other issues will take the place of that—the League—which for the present seems to be the most prominent. But all that I am not going to discuss at all—whether we ought or ought not to enter into such a league. But I want to take up, as I say, the constitutional objections.

The first one is that we change our form of government; that we create a super-sovereign, consisting of the Council or the Assembly, and that we part with part of our sovereignty to that Council or that Assembly.

Now, I submit that the Council, with only recommendatory powers, or only powers as a quasi-judicial tribunal in submitted differences, where it sits necessarily in a quasi-judicial capacity, is not a government at all. It has not behind it any force. It cannot command any force. It recommends. It is an intermediary body for the purpose of facilitating the agreement of the powers and then unanimity in action, which Lord Robert Cecil said was the basis of the form that the Covenant had taken. They are only intermediaries. They exercise no direct power themselves. The decisions as to what is to be done by those who are to execute the purposes of the treaty must be made by the nations themselves, according to their own constitutional authority.

One remark about sovereignty. It is said that we part with our sovereignty when we promise to make war, promise to go into a boycott, promise to limit our army. Well, I venture to dispute that proposition. Of course the making of war is an evidence of sovereignty. Of course the making of a law is. But to promise to do one thing which does not sum up the faculties of sovereignty—to do one thing in the future—is not to part with sovereignty. The truth is that a sovereign that cannot agree with other nations to do something is not a sovereign at all. It is a nation that ought to go into a guardianship. (Applause). A minor who cannot contract a debt that will bind him is not ordinarily regarded as of full power. Now I do not mean to say that you might not promise to do so many things that you really do interfere with and obstruct your sovereignty. If the promise covers a great many subjects, then it becomes a matter of degree. But all nations promise to do things. All nations must promise to do things, in order that there shall be any international relations at all.

Take the analogy of a free man. Does he lose his liberty when he promises to render service of a month or a year to another? He binds himself. The law will not specifically enforce it. One element of sovereignty is power to break a contract as well as to make it. Now you cannot enforce a year's contract of service against a free man. I do not mean that there are not some exceptions in this respect, but generally in law a man who makes a contract of service can break it and your only remedy is damages. If you could keep him going by force for a year, you have transgressed the line that ordinarily determines freedom and liberty and you have introduced an element of slavery. Certainly we have said so in our country, under the thirteenth amendment, that where you have a statute by which you can compel a man and punish him for not performing his contract of service, you have violated the thirteenth amendment against slavery. And so a sovereign may make a contract to do what its sovereignty enables it to break. It is a little like foreordination and free will. The power to do right or to do wrong is the element of sovereignty, as it is the element of liberty, and creates responsibility and the sense of it. It is not correct, therefore, to say that this takes away our sovereignty because we agree to do something in the future with reference to war, with reference to armament.

Then it is said it changes our form of government. Why? It is said the power to make war is vested by the constitution in Congress; Congress may declare war, Congress may carry it on; therefore, when the treaty-making power agrees that the Government shall make war, it is taking away the power of Congress to determine in its discretion, when the occasion arises, whether that war shall be made.

Well, what is the answer? The answer is that it does not take away the power. It merely imposes the obligation, so that the action of Congress in not making war is a breach of its contract, but it does not take away the power of Congress either to make or not to make war.

In other words, gentlemen, the treaty-making power is the promising power of the government; and when we make a promise of that sort, the treaty-making power *is* the government. Congress is the performing power of the government, and, therefore, when we come to perform, Congress *is* the government; and if Congress does not perform the promises made by the government, when it makes them through its constitutional agency to promise, then it breaks its promise, that is all. And there is nothing in the promise that in any way curtails or cuts down the discretion vested in Congress by the constitution to declare or make war.

It is the same way with reference to declaring an embargo necessary to enforce the universal boycott that under the sixteenth article of the League is the penalty visited against those who fail to keep their covenants to submit differences and to delay war until three months after the recommendation or decision is made.

The point has been made a good many times, and been urged, that by promising to make war or not to make war, the treaty-making power is taking away something from Congress. Now, I say there is nothing in it whatever, and that when you see the distinction between the government in promising, and the government through a different agency performing, you can see that the government is the same; the government has made the promise and the government has the power, though not the moral or indeed the legal right, to violate that promise. Nevertheless, it has the power, and that is what makes sovereignty, and that is what constitutes the actual functioning power of a branch of the government.

This is proven by the construction put upon that power for a number of years, ever since the beginning. Why, the argument has gone so far as to assert that we cannot agree to arbitrate anything which shall result in an obligation on the part of Congress to perform what the award of that arbitration requires because it takes away the power of Congress. Now, is it necessary to answer an argument like that? I do not want to take away from the credit of Great Britain or of Canada in the matter of arbitrations, but I venture to say we more than any other country in the world have resorted to arbitration and sought arbitration whenever we could. And for a hundred years. Why, the first treaty that we made with Great Britain, the Jay Treaty contains a provision for arbitration and we have had it in all our

treaties ever since. Now, if it be true that to arbitrate is to submit something that may control Congress and therefore take away from its power to act, then we would have no right to arbitrate anything. And so to make war; so to guarantee independence.

We have now a treaty made with Panama by which we guarantee her independence and the integrity of her territory. That is nothing but the same obligation entered into in Article X. Nobody has ever said that that treaty was wrong. We had got something for it. We got our treaty with Panama, which enabled us to build the Panama Canal. And can we back out of that on the ground that it ousted the power of Congress with reference to the making of war?

When you come to resort to precedent you find not only that, but the Bryan treaties, of which there were some twenty, I think, or twenty-three—I don't know how many—which provide that no nation under those treaties shall go to war until a year after the event leading to the war and until after investigation and report shall be made. Now that limits the power of Congress to declare war, for a year; and if it does, it ousts its power to declare war—if that be true—if that is the theory. So that precedent is entirely at variance with any such proposition.

See the *reductio ad absurdum* that you have. Congress is the only power under the constitution that can pay money out of the Treasury of the United States. If that be true, if this view be true that we cannot agree to do anything that Congress is the constitutional agency in doing, then we of the United States cannot agree to pay another nation any money in the future. We can back out of every contract. We did agree to pay twenty millions for the Philippines and we paid it. We agreed to pay such an award as might be made in the Fisheries Arbitration; and you found that we had taken fish—or the arbitration found that we had taken fish to the extent of five millions. We did not like it, we made grimaces, just as you did over the Geneva arbitration, but we paid the money, and we did not attempt to get out of it on the theory that it took away the power of Congress to use its independent discretion in paying money. It did not do any such thing. It only left to Congress the power to decide whether we ought to pay our debts, or ought not to—that is all.

In this way it seems to me I have covered the chief objections on any constitutional ground to the entry of the United States into such a treaty as that proposed. The constitutional decisions as to the character of our government written by Chief Justice Marshall are illuminating and convincing as to the character of the nation which was created by the constitu-

tion. Whatever the merits of this particular League may be, it would be a great interference with the usefulness of the government of the United States for the people of the United States, on the one hand, and for the neighbours of the United States, and the world—for all the world is her neighbour now—if the United States might not enter into obligations of an affirmative character to do certain things in consideration of other nations doing either the same thing or a thing of some other nature. And I do not think those people who contend against the power of the United States to make such a contract fully realize how completely such a construction would relegate our great nation and our great government, the power of which Marshall and the whole court have always exalted, would relegate that government and nation to the disability of infants and of persons irresponsible, so that they may not make obligations that shall be binding on them. (Great applause).

